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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION, ET AL.,

PETITIONERS,

vs.

INDEPENDENCE TUBE CORPORATION,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether combinations between parent corporations and their autonomously operated subsidiaries which unreasonably restrain trade should be exempt from Section 1 of the Sherman Act.

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I. INTRODUCTION

The States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Illinois, Iowa, Kansas, Ken-

tucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia respectfully submit this brief amici curiae pursuant to Supreme Court Rule 36.4.

II. IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity Of Amici States

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they are charged by law with responsibility for the enforcement of the antitrust laws of their respective states, and of the federal antitrust laws. In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as *parens patriae* on behalf of their natural citizens. (15 U.S.C. § 15(c)). The Corporation Counsel for the District of Columbia has similar enforcement responsibilities. (D.C. Code Ann. § 28-4507 (1981)).

B. Interest Of The Amici States In This Case

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and this Court's numerous pronouncements with respect thereto. Moreover, the states' antitrust laws are generally construed in accordance

with federal court decisions interpreting corresponding provisions of the federal laws.[1]

For these reasons and for the reasons more fully set forth herein the Amici States oppose the contentions of petitioners, the United States, and Amici supporting their position that anticompetitive contracts, combinations and conspiracies between parent and subsidiary corporations can never be violations of Section 1 of the Sherman Act. These contentions are antithetical to the interests of the Amici States in sound antitrust policy and effective enforcement of the antitrust laws.

III. SUMMARY OF ARGUMENT

The objectives of the Sherman Act, the clear holdings of this Court, and sound antitrust policy considerations mandate continued application of Section 1 of the Sherman Act to affiliated corporations.

1. This Court has always interpreted the Sherman Act in accordance with its basic objective of preserving competition. The Court has steadfastly condemned conduct which inhibits access to channels of commerce and prevents the emergence of new competition. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The anticompetitive effects which occurred in this case are clearly those which the Sherman Act was intended to interdict. In

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[1] *See, e.g., People v. North Avenue Furniture & Appliance, Inc.*, 645 P.2d 1291 (Colo. 1982); *Neyens v. Roth*, 326 N.W. 2d 294 (Iowa 1982); *Grams v. Boss*, 97 Wis.2d 332, 294 N.W.2d 473 (1980); *Marin County Bd. of Realtors, Inc., v. Palsson*, 130 Cal. Rptr. 1, 549 P.2d 833 (Cal. 1976); *State v. Readers Digest Assoc., Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972); *Pittsburg Plate Glass Co. v. Paine & Nixon Co.*, 234 N.W. 453 (Minn. 1931).

this case, there is compelling evidence of the intent of petitioners to foreclose entry of a new competitor which they feared would introduce vigorous price competition into the structural tubing market. There is no basis in law or economic theory for the Court now to deviate from the course so clearly delineated by the Sherman Act and consistently followed by this Court for nearly a century.

2. The Court has clearly and consistently ruled that parent and subsidiary conduct may be violative of the Sherman Act. The foundation of the Court's decisions is the basic purpose of the Sherman Act to preserve competition by prohibiting all forms of restraint which impede the free competitive process. In enacting the Sherman Act, Congress was concerned not with the form by which any particular restraint might be imposed but with the substantive effects of the restraint. Contrary to petitioner's argument that this Court's prior holdings elevate corporate form over substantive conspiracy concepts, the Court has utilized an unchanging analysis — the liability of affiliated corporations under Section 1 of the Sherman Act must always be based upon a determination of the practices challenged in light of the purpose of the Sherman Act. Corporate form is not a defense where the statute is otherwise transgressed. The new rule of law proposed by petitioners and the United States here would prohibit any consideration of the practices at issue and hold that all restraints of trade in which affiliated corporations engage, whether they are anticompetitive or not, would be exempt from the Sherman Act. Not only would such a result fly in the face of congressional intent, but it also would be contrary to sound antitrust policy.

3. The ability of enforcement authorities to apply the sanctions of Section 1 where affiliated corporations restrain the trade of third parties is of great importance to the State Attorneys General. The principles that have emerged from the decisions of this Court, as applied by the

lower courts, provide enforcement authorities with the ability to challenge the joint activities of affiliated corporations which result in demonstrably adverse effects on competition. At the same time, these principles insure that legitimate internal management decisions of affiliated corporations will not subject the corporations to Section 1 liability. Liability has been imposed only where the affiliated corporations in fact function as separate economic units *and* their joint conduct is directed at third parties. The Court's decisions do not discourage efforts to create legitimate efficiencies in organization, they discourage only anticompetitive conduct. Under the decisions of this Court, as applied by the lower courts, the choice of corporate organization would affect antitrust liability only where affiliated corporations act with the intention to exclude a competitor or otherwise restrain the trade of others. The decisions of the Court insure that Section 1 can be utilized to prohibit the joint activities of affiliated corporations where their activities have no legitimate business purpose, are designed to unreasonably restrain the trade of others and do in fact damage competition. This case represents a stark example of the type of conduct which should be prohibited by the antitrust laws — conduct undertaken for the specific purpose and having the desired effect of unreasonably restraining trade by excluding a significant competitor.

4. The rule proposed by petitioners and the United States would immunize otherwise unlawful conduct and impede enforcement of state and federal antitrust law. Petitioners' proposed rule places sole reliance on the percentage of stock ownership and prohibits any examination of economic distinctness, anticompetitive purpose or anticompetitive effect. Petitioners would thereby have the Court disregard the substance of their conduct and rely solely on the form by which a restraint was imposed. Any rule which would prohibit the application of Section 1 to the joint con-

duct of affiliated corporations solely on the basis of that affiliation, as proposed by petitioners, would insulate from antitrust liability the joint conduct of many thousands of subsidiaries and their parent or related corporations. Such a rule would seriously impair the ability of the Amici States to protect their citizens from the very anticompetitive conduct the Sherman Act was designed to prohibit. Further, antitrust statutes other than Section 1 are not adequate to deal with the unlawful and anticompetitive joint activities of affiliated corporations. Elimination of the remedies provided under the federal antitrust laws, including treble damages and the recovery of reasonable attorneys' fees, will severely inhibit private parties and state enforcement authorities from bringing suits against the perpetrators of such anticompetitive conduct.

5. Any change in the coverage of the Sherman Act should be made by Congress. This Court has always held that the doctrine of *stare decisis* is "a powerful force in our jurisprudence". *United States v. Maine*, 420 U.S. 515, 527 (1975). Moreover, as the Court stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation". The doctrine which petitioners and the government seek to overturn has been in effect ever since the Sherman Act was adopted, and Congress has made no effort to repeal the Court's holdings in the conspiracy area, thoug'ı Congress has amended the statute during that time in numerous other respects. The Court has frequently and consistently held that affiliated corporations are prohibited by the Sherman Act from combining to engage in such exclusionary alliances. In these circumstances, an overruling of all of the Court's earlier decisions would conflict with the legislative intent and seriously contravene the important doctrine of *stare decisis* so fundamentally embedded in our jurisprudence.

IV. ARGUMENT

THE OBJECTIVES OF THE SHERMAN ACT, THE CLEAR HOLDINGS OF THIS COURT, AND SOUND ANTITRUST POLICY CONSIDERATIONS MANDATE CONTINUED APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO AFFILIATED CORPORATIONS

A. The Purpose Of The Sherman Act Is To Preserve Competitive Freedom.

This Court has always held that the Sherman Act must be interpreted in accordance with its basic objective of preserving competition. Accordingly, the Court has been particularly concerned with the effect of the practices in issue upon competition and with the intent of the parties engaging in the challenged activities.

In this case, there is compelling evidence of the intent of petitioners to foreclose the entry of a new competitor which they feared would introduce vigorous price competition into the structural tubing market. Petitioners intimidated potential suppliers to refrain from dealing with respondent and thereby excluded respondent from the market for a substantial period. While petitioners contended that their purpose in making such contacts was to put persons on notice of their intention to protect "trade secrets", the district court concluded that there was considerable evidence that their true purpose was to "prevent or delay [Independence's] entry into the market", and the Court of Appeals characterized petitioners' contention as "specious". (Cert. App. B-25; A-27). The jury found that the exclusion of Independence resulted in a decrease in product supply and higher prevailing prices to consumers, and this finding was affirmed by the Court of Appeals. (Cert. App. A-21). This Court granted certiorari only on the narrow issue of

whether petitioners, parent and subsidiary corporations, constitute separate entities capable of combining with each other under the Sherman Act. Thus, at this point in the proceeding it must be taken as true that the petitioners acted to establish a group boycott with intent to destroy respondent and that such acts resulted in a substantial trade restraint in a relevant market to the injury of the competitive process and to the detriment of consumers.

The anticompetitive effects which occurred in this case are clearly those which the Sherman Act was intended to interdict. Therefore, the statute should apply in this case unless the specific language of the Sherman Act precludes such application. Clearly, it does not. This Court has consistently held that such anticompetitive practices of affiliated corporations are covered by the statute. The decisions of this Court are in conformance with the broad mandate of the statute to preclude all unreasonable restraints of trade by whatever form or means the parties have chosen to accomplish them.

This Court has always construed Section 1 of the Sherman Act to achieve this broad social and economic objective. Thus, in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958), the Court described the spirit and purpose of the Act in the following terms:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

The Court reiterated these objectives in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.

In this case petitioners acted to induce others to join a classic group boycott to deprive respondent of the "freedom to compete" by denying to it the economic tools to enter the business. It is difficult to imagine a situation which more closely corresponds to the concerns embodied in the Sherman Act and expressed in the Court's holdings.

This Court has always been vigilant in preserving the economic liberties so cogently articulated in these cases. It has steadfastly condemned conduct which inhibits access to channels of commerce and prevents the emergence of new competition. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). There is no basis in law or economic theory for the Court now to veer from the course so clearly delineated by the statute and consistently followed for nearly a century.

B. The Court Has Clearly And Consistently Ruled That Parent And Subsidiary Conduct May Violate The Sherman Act.

In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), this Court held that "common ownership and control . . . are impotent to liberate the alleged combination and

conspiracy from the impact of the Act." *Id.* at 227. The Court has soundly reaffirmed that holding in each subsequent decision in which there was occasion to address the issue.

The foundation of the Court's decisions is the basic purpose of the Sherman Act to preserve competition by prohibiting all forms of restraint which unduly interfere with the free competitive process. The concern of Congress was not with the form by which any particular restraint might be imposed but with the substantive effects of the restraint. Thus, Congress adopted a broad prohibition against "[e]very contract, combination in the form of trust *or otherwise*, or conspiracy, in restraint of trade . . . ." 15 U.S.C. § 1 (emphasis added). This comprehensive prohibition conformed to the common law rule against such trade restraints. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). Congress, "having employed a word that has a common-law meaning, should be presumed to have intended its common-law meaning unless it appears that such a construction is not in accord with the purposes of the statute." Note, *Developments in the Law of Conspiracy*, 72 Harv. L. Rev. 922, 1003 (1958). The statements of this Court in *Yellow Cab* are, therefore, a direct manifestation of legislative intent:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.
>
> * * *
>
> The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. (332 U.S. at 227).

Petitioners criticize the Court's holdings as elevating corporate form over substantive conspiracy concepts. To the contrary, as the Court makes clear in *Yellow Cab*, the substance of the statutory concern is the existence of a trade restraint. The Court holds simply that corporate form is not a defense where the statute is otherwise transgressed.

The subsequent decisions of the Court have consistently adhered to these basic principles. Thus, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court held that conspiratorial enforcement of a resale price control scheme was not excused from Sherman Act coverage merely because of the common ownership of the conspirators. Such common ownership "does not liberate corporations from the impact of the antitrust laws." *Id.* at 215. Similarly, in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), the Court held that a cartel arrangement to suppress all competition was clearly prohibited by Section 1 despite common ownership of the conspirators. *See also Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948).

The most recent decisions of the Court on this issue have further reinforced and illuminated the applicable principles. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the Court pointed out that where firms avail themselves of "the privilege of doing business through separate corporations" they cannot choose to reject the "obligations that the law imposes on separate entities." *Id.* at 141-142. In this regard, the Court has always held that corporate entities "will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946). In the antitrust field, this formulation is particularly appropriate and was

applied again by the Court in *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975).

In *Citizens & Southern*, the Court specifically reaffirmed the holding of *Yellow Cab* that "corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *Id.* at 116. The Court went on to hold that, in the particular facts of that case, the objectives of the Sherman Act would not be achieved by finding a violation because the creation and operation of the corporations there involved resulted in the establishment of new competition. Contrary to petitioners' argument, *Citizens & Southern* does not represent any departure from the Court's previous holdings. Instead, it reaffirms the unchanging analysis — the liability of affiliated corporations under Section 1 of the Sherman Act must always be based upon a determination of the practices challenged in light of the purpose of the statute.

The new rule of law proposed by petitioners and the United States here would do quite the opposite. It would prohibit any consideration of the practices at issue and hold that all restraints of trade in which affiliated corporations engage, whether they are anticompetitive or not, would be exempt from the Sherman Act. Such a result would fly in the face of congressional intent and would be contrary to sound antitrust policy.

C. The Decisions Of This Court And The Lower Courts Provide Enforcement Authorities With The Ability To Prohibit Anticompetitive Conduct While Protecting The Legitimate Activities Of Affiliated Corporations.

The principles that have emerged from the decisions of this Court, as applied by the lower courts, provide enforcement authorities with the ability to challenge the joint

activities of affiliated corporations which result in demonstrably adverse effects on competition. At the same time, these principles insure that legitimate internal management decisions of affiliated corporations will not subject the corporations to Section 1 liability. Liability has been imposed only where the affiliated corporations in fact function as separate economic units *and* their joint conduct is directed at third parties.

As the United States concedes, economists recognize that subunits of a firm constitute separate economic units where they are autonomously operated. (U.S. Br. at 8 n.7). Thus, the courts examine the relationship between the affiliated corporations to determine whether they realistically constitute "separate units or one entity." *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). *See also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1054 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 858-59 (N.D. Cal. 1979), *aff'd on other grounds sub nom., Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

In the instant case, the Court of Appeals pointed out that the courts have developed a list of factors which resolves the issue of separateness based on "evidence that is empirical, readily furnished, and amenable to development at trial . . . ." (691 F.2d at 318; Cert. App. A-12). Indeed, the jury here was instructed that Regal had the capacity to conspire with Copperweld only if it were found to be "sufficiently distinct from Copperweld as an economic entity . . ." (691 F.2d at 319; Cert. App. A-14). The courts have adhered to this test and have dismissed Section 1 claims where the evidence did not clearly establish the existence

of separate economic entities. *See Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Las Vegas Sun, Inc., supra; Knutson, supra.*

The courts have recognized that when affiliated corporations constitute separate business units, a combination of their economic power to exclude competition raises substantial antitrust concerns. As the court noted in *Inglis, supra*, when a parent and subsidiary constitute separate economic units, the parent's capacity to "strengthen an anticompetitive assault perpetrated by that subsidiary, is of sufficient concern to antitrust policy" to warrant the applicability of Section 1. 668 F.2d at 1055.

Separate business units derive their separate economic leverage from their individual business relationships. Here, for example, the courts below found that Regal, operating in separate markets from Copperweld, developed its own set of suppliers and customers. As the Court of Appeals found, these separate business relationships gave petitioners "the ability . . . to bring pressure to bear on more people if they worked together than either could alone . . . ." (691 F.2d at 320; Cert. App. A-17).

Where such ability is used unreasonably to restrain the trade of third parties, Section 1 is properly applicable. The Attorney General's National Committee To Study the Antitrust Laws so concluded almost thirty years ago. The Committee's report noted that "when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 may be transgressed." (*Report of The Attorney General's National Committee To Study The Antitrust Laws* 35 (1955)). The analysis of the *Attorney General's Report*, derived from this Court's holdings, has been consistently followed by the lower courts and has been approved by commentators. *See, e.g.*, J. Von Kalinowski, *Antitrust and Trade Regulation* § 6.01[2][c][i] 6-28 to 6-31 (1982); L. Sullivan, *Law of An-*

titrust 328 (1977); F. Easterbrook and R. Posner, *Antitrust Law* 730 (2d ed. 1981).

The restraint on third parties requirement insures that the conduct of legitimate business through separate but affiliated corporations will not unwittingly come within the reach of the antitrust laws. It also insures that businessmen will not be inhibited in choosing the most appropriate form of business organization. There is absolutely no basis for the assertion of the government and petitioners that the Court's decisions have inhibited the formation of corporate subsidiaries to achieve efficiencies. Under these decisions the choice of corporate organization would affect antitrust liability only where affiliated corporations act with the intention to exclude a competitor or otherwise restrain the trade of others. Where there is an anticompetitive purpose and effect, it is appropriate that antitrust policy deter such conduct. Thus, the Court's decisions do not discourage efforts to create legitimate efficiencies in organization, they discourage only anticompetitive conduct. Moreover, under the antitrust laws economic efficiency has never been considered paramount to the protection of competition. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 68-70 (1977) (White, J., concurring). Indeed, despite the assertions by present federal enforcement officials that "efficiency", as they would define it, is the sole concern of the antitrust laws, thoughtful commentators have vigorously asserted a variety of other goals. *See, e.g.*, Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 67 (1982).

The ability of enforcement authorities to apply the sanctions of Section 1 where affiliated corporations restrain the trade of third parties is of great importance to the State Attorneys General. There are many thousands of subsidiaries operating in every segment of the United States econ-

omy. P. Blumberg, *The Law of Corporate Groups* 463-74 (1983). It is obvious that the activities of subsidiaries have substantial impact on the residents of the fifty states and the District of Columbia.

The principles of the decisions of the Court, as applied by the lower courts, insure that Section 1 can be utilized to prohibit the joint activities of affiliate corporations where their activities have no legitimate business purpose, are designed to unreasonably restrain the trade of others, and do in fact damage competition. This case represents a stark example of the type of conduct which should be prohibited by the antitrust laws — conduct undertaken for the specific purpose and having the desired effect of unreasonably restraining trade by excluding a significant competitor.

D. The Rule Proposed By Petitioners And The United States Would Immunize Otherwise Unlawful Conduct And Impede Enforcement Of State And Federal Antitrust Law.

1. There is no Legal or Logical Basis for Overruling the Court's Previous Decisions.

The United States Justice Department and the Federal Trade Commission are charged with the responsibility of antitrust enforcement on the federal level. It is ironic, therefore, that a plea for retrenchment of antitrust principles should be supported by those agencies.

State enforcement authorities and private plaintiffs play an important and ever-increasing role in the overall national antitrust policy established by Congress. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73, n.10 (1982). The burden of antitrust enforcement has fallen more heavily upon the State Attorneys General in recent years, as antitrust enforcement at the federal level has de-emphasized more traditional anti-

trust enforcement actions.[2] This in itself presents increased antitrust enforcement responsibilities for the Amici States, but the United States now seeks to immunize an area of antitrust concern from all enforcement activities. It is one thing for the United States to exercise prosecutorial discretion by refraining from filing certain types of antitrust actions, but it is quite another to support the adoption of a new rule of law which would permanently remove the discretion of all government agencies and private parties to initiate actions to seek redress and to protect the public interest. *See* Litvak, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 Texas L. Rev. 649 (1982).

Such a rule is especially incongruous where, as in this instance, the existing statutory interpretation was established in large part through the prosecution efforts of the United States and had consistently been endorsed by United States Attorneys General in charge of the Antitrust Division until a few months ago. *See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws* 34 (1955); Statement of Donald F. Turner, Assistant Attorney General Antitrust Division, 34 Antitrust L.J. 113, 123 (1967) (doctrine applies to "closely related corporations where the conduct involved is beyond defense and involves coercion of outsiders"); Letter of Richard W. McLaren to Board of Governors of the Federal Reserve System, *reprinted in*, 1983 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 50,122, p. 55,197 (Feb. 22, 1971) (policy to apply doctrine to challenge practices engaged in by commonly controlled firms which have "a coercive or restrictive effect on out-

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[2]*See Number of Private Actions Rises, As Number of Government Suits Falls*, ANTITRUST & TRADE REG. REP. (BNA) Vol.45, No. 1132, at p. 412 (September 22, 1983).

siders."); United States Department of Justice, Antitrust Guide for International Operations, 12 n.26 (1977) (doctrine applies to coercive attempts by members of a corporate group to drive third parties out of business or out of markets).

The United States neither acknowledges the consistent position which its antitrust division officials have taken on this issue in the past, nor does it attempt to explain why government enforcement policy should change so radically at this point in time. Neither the United States nor petitioners present any arguments which have not been made to this Court time and again in the past. They present no new data or economic research. Indeed, virtually every argument now presented may be found in the briefs opposing the United States presented to the Court in the prior cases involving this issue.

2. The Immunization of Parent-Subsidiary Combinations Would Hinder Antitrust Enforcement.

Any rule which would prohibit the application of Section 1 to the joint conduct of affiliated corporations solely on the basis of that affiliation, as proposed by petitioners, would insulate from antitrust liability the joint conduct of many thousands of subsidiaries and their parent or related corporations. Such a rule would seriously impair the ability of the Amici States to protect their citizens from the very anticompetitive conduct the Sherman Act was designed to prohibit.

Petitioners' proposed rule places sole reliance on the percentage of stock ownership and prohibits any examination of economic distinctness, anticompetitive purpose or anticompetitive effect. Petitioners would thereby have the Court disregard the substance of their conduct and rely

solely on the form by which a restraint was imposed. Commentators have recognized that such factors are "inconsequential in and of themselves." P. Blumberg, *supra* at 17-18. Further, petitioners' proposed "test" would ignore the conclusion of economists that separately operated, but affiliated, corporations are separate economic units. Petitioners also ignore the clear admonition of this Court that "[t]he corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *United States v. Yellow Cab Co.*, 332 U.S. at 227. Moreover, by failing to take into account the nature of the joint conduct involved, petitioners' rule runs directly counter to this Court's holding that "[t]he test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce." *Id.*

Perhaps the most eloquent evidence to support the necessity of the parent-subsidiary conspiracy concept is the case now before the Court. Here a parent and subsidiary corporation were able to pool their economic power to exclude a competitor, thereby damaging competition for a substantial period of time — a clear restraint of trade. But for application of Section 1 of the Sherman Act, such practices would not be prohibited by the antitrust laws; yet this is clearly the type of anticompetitive practice that gave rise to the Sherman Act in the first instance. Moreover, the commodity type products of the structural tubing industry are particularly susceptible to collusive pricing activities. *United States v. Berger Industries Inc.*, Crim. No. 79-278; Civ. No. 79-4567 (E.D. Pa. 1979) (price-fixing complaints in the electric weld steel tubing industry). The loss of price competition which might be introduced by new firms in such industries is therefore particularly meaningful to consumers.

There are an infinite number of ways by which "a parent and its subsidiary, though short of an attempt to monopolize, [may] nevertheless plan to drive out a compet-

itor . . ." or otherwise restrain the trade of strangers to the corporate family. *Report of the Attorney General's National Committee to Study the Antitrust Laws* 35 (1955). The antitrust laws should be concerned with such activities, and the petitioners and the United States concede as much when they suggest that antitrust statutes other than Section 1 might be invoked with respect to such behavior. (Pets. Br.45; U.S. Br. 27). As suggested by the Attorney General's Report, *supra*, however, other antitrust provisions are not adequate to deal with such anticompetitive behavior.

For example, as Section 2 of the Sherman Act has been interpreted by the courts, it may be invoked only where it can be proved that there is a substantial likelihood that the defendants will actually achieve monopoly. This requires a showing of substantial market shares. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969) (no Section 1 violation for lack of separate legal entities; no Section 2 violation for lack of sufficient market share). Section 2 does not address situations in which firms in different product markets are able to combine their commercial contacts to accomplish unreasonable trade restraints in one of those markets. Indeed, Section 2 was intended simply as an adjunct to Section 1, which was intended to reach all unreasonable trade restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911). Congress intended to prohibit such predatory practices under Section 1 because those practices tend toward monoply. *Id.* This Court has recognized that Section 1 of the Sherman Act was designed to preserve the freedom of traders to buy and sell "in an open competitive market," and therefore:

> [T]he Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,' " whether "the tendency is a creeping one" or "one that proceeds at full gallop." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. at 213-214 (1959).

Since parent and subsidiary corporations have always been held capable of combining under Section 1, the courts have not been concerned with such activities in their interpretation of Section 2 of the Sherman Act. As a supplement to Section 1, that statute has been interpreted to prohibit exclusion of competitors only where defendant has a high market share. Petitioners and the United States now ask the Court to change only the Section 1 side of the Sherman Act equation without a corresponding change in Section 2. Not only would this be judicial legislation, it would also result in the virtual immunization of exclusionary practices by most parent-subsidiary combinations. Under this interpretation, "the Sherman Act would soon be emasculated; . . . it would not be the charter of freedom which its framers intended." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

Similarly, Section 7 of the Clayton Act is inadequate to deal with such practices. 15 U.S.C. § 18. Section 7 of the Clayton Act prohibits mergers and acquisitions which may lessen competition. That statute is not capable of anticipating all types of anticompetitive arrangements which might be undertaken in the future by affiliated firms. Moreover, the United States has reduced enforcement efforts in this area as well. *See, e.g.*, Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 Calif. L. Rev. 575 (1983).

Neither Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) nor state tort law are adequate remedies. The FTC has rarely used Section 5 to attempt to police restraints of the type at issue here, and neither the petitioners nor the United States has cited cases which suggest otherwise. Moreover, neither the State Attorneys General nor private parties may assert actions under that statute. Similarly, state tort law is not an adequate substitute for

Section 1 of the Sherman Act. Indeed, it was this inadequacy which caused the adoption of the Sherman Act. Moreover, tort laws do not pre-empt the Sherman Act. To the contrary, the Court has held that the antitrust laws are "at least as broad as a plaintiff's right to sue for analogous torts. . . ." *Hydrolevel, supra,* 456 U.S. at 569.

It should also be noted that state enforcement authorities do not have the authority to bring tort actions unless specifically authorized by statute. Even where such authority exists, however, reliance solely on such authority would seriously limit the ability of State Attorneys General to prohibit unreasonable restraints of trade by affiliated corporations. Not all conduct which results in a restraint of trade also happens to involve a tort. For example, the exclusion of a competitor will not necessarily involve the knowing interference with a contract. In the instant case, the jury found that Regal did not commit a tort even though it was an active participant in the scheme to eliminate Independence. Moreover, tort laws differ among the states. Conduct which may be a tort in one state may not be recognized as one in another state.

Finally, unlike state tort law, the federal antitrust laws provide for treble damages and the recovery of reasonable attorneys fees. Those remedies were provided to encourage private actions which this Court has recognized as "a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc., supra,* 392 U.S. at 139. This Court noted that "the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id.* Treble damages and reasonable attorneys fees are awarded to encourage private actions and to insure that the remedy meaningfully counterbalances "the difficulty of maintaining a private suit" for violations of the Sherman Act. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,*

429 U.S. 477, 486 n.10 (1977) (*quoting from* 21 Cong. Rec. 2456 (Statement of Sen. Sherman)).

Litigation of antitrust-type claims often can be enormously complex, time-consuming and costly. As in this case, the costs of prosecuting such claims can approach or exceed simple damages, even when they are substantial. (Cert. App. C-1). Without the availability of the remedies provided by the antitrust laws, private parties and state enforcement authorities will be severely inhibited by the high cost of litigation from bringing suits against the perpetrators of such anticompetitive conduct. A strong deterrent force against such conduct would be lost despite the clear intent of Congress that private suits constitute an important means of enforcing the antitrust laws. *Brunswick Corp.*, 429 U.S. at 486 n. 10 (*citing* 51 Cong. Rec. 16274-75 (Statement of Rep. Webb), 16317-19 (Statement of Rep. Floyd)).

F. Any Change In The Coverage Of The Sherman Act Must Be Made By Congress.

Petitioners and the United States request this Court to overrule all of its past decisions and to reduce the scope of Sherman Act coverage. Such action would collide with the doctrine of *stare decisis* and would be an impermissible invasion of the legislative function.

This Court has always held that the doctrine of *stare decisis* is "a powerful force in our jurisprudence." *United States v. Maine*, 420 U.S. 515, 527 (1975). Moreover, as the Court stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." The doctrine which petitioners and the government seek to overturn has been in effect ever since the Sherman Act was adopted, and Congress has made no effort to repeal the

Court's holdings in the conspiracy area, though Congress has amended the statute during that time in numerous other respects.

The role of the Court to interpret legislation, but not to legislate, is mandated by the Constitution and by practical considerations. The courts are simply not equipped to engage in a balancing of economic and social policy considerations as is the Congress. *Northwestern Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). As the Court stated in *United States v. Rutherford*, 442 U.S. 544, 555 (1979), "federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. . . ." *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) ("[T]o make the delicate judgment on the relative value to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.").

During the last two terms the Court has continued to reiterate its limited role in the antitrust field. Thus, in *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2478-79 (1982), the Court stated:

> By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are better directed to the legislature. Congress may consider the exception that we are not free to read into the statute.

See also Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356 (1983); *BankAmerica v. United States*, 103 S.Ct. 2266 (1983).

This case presents a classic example of the type of anticompetitive trade restraints interfering with the right of citizens to engage in business that was of such concern

to Senator Sherman. (21 Cong. Rec. 2457, 51st Cong., 1st Sess. (1890)). The Court has frequently and consistently held that affiliated corporations are prohibited by the Sherman Act from combining to engage in such exclusionary alliances. In these circumstances, an overruling of all of the Court's earlier decisions would conflict with the legislative intent and seriously contravene the important doctrine of *stare decisis* so fundamentally embedded in our jurisprudence.

V. CONCLUSION

For the foregoing reasons the Amici States respectfully submit that the decision below should be affirmed.

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